

## **Singh (Migration) [2019] AATA 2437 (26 June 2019)**

### **DECISION RECORD**

|                           |                                                                                                        |
|---------------------------|--------------------------------------------------------------------------------------------------------|
| <b>DIVISION:</b>          | Migration & Refugee Division                                                                           |
| <b>APPLICANT:</b>         | Mr Kamaldeep Singh                                                                                     |
| <b>CASE NUMBER:</b>       | 1725620                                                                                                |
| <b>DIBP REFERENCE(S):</b> | BCC2016/3237564                                                                                        |
| <b>MEMBER:</b>            | Brendan Darcy                                                                                          |
| <b>DATE:</b>              | 26 June 2019                                                                                           |
| <b>PLACE OF DECISION:</b> | Melbourne                                                                                              |
| <b>DECISION:</b>          | The Tribunal affirms the decision to cancel the applicant's Subclass 573 Higher Education Sector visa. |

Statement made on 26 June 2019 at 5:11pm

### **CATCHWORDS**

*MIGRATION – cancellation – Student (Temporary) (Class TU) visa – Subclass 573 (Higher Education Sector) – ground for cancellation – incorrect information in visa application – Form 157A at question 30 – attended and graduated from a different school – bogus document – Year 12 certificate – exaggerated academic results – consideration of discretion – visa grant based on incorrect information/bogus document – claims to be victim of unethical agent – credibility issues – knowingly non-compliant – not a genuine student – decision under review affirmed*

1.

### **LEGISLATION**

*Migration Act 1958 (Cth), ss 101, 103, 107, 109*  
*Migration Regulations 1994 (Cth), Schedule 2, cl 573.223*

### **CASES**

*MIAC v Khadgi (2010) 190 FCR 248*

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration to cancel the applicant's Subclass 573 Higher Education Sector visa under s.109(1) of the *Migration Act 1958* (the Act).
3. The delegate cancelled the visa on the basis that the applicant had provided incorrect information and a bogus document in his application for a student visa (TU 573). In this regard, the delegate found the applicant to have breached sections 101(b) and 103 of the Act. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
4. The applicant appeared before the Tribunal on 4 April 2019 to give evidence and present arguments. The Tribunal also received oral evidence from a witness claiming to be the applicant's uncle, Sikhbir Namberdar who resides in Pakenham in Victoria.
5. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be **affirmed**.

### GROUND FOR CANCELLATION

#### Background

6. The applicant claimed to be born in Beriya Daulat in the Indian state of Uttarakhand on 19 August 1996 and to be a citizen of the Republic of India. He provided the Tribunal with a copy of his passport biodata page.<sup>1</sup>
7. The delegate's decision submitted to the Tribunal indicates the applicant was granted a Subclass 573 Higher Education Sector student visa on 1 April 2016 and the stay period of the visa extended up to and included 15 September 2019.
8. According to the delegate's decision the applicant was granted his a Subclass 573 Higher Education Sector student visa to study English for Academic Purposes and a Bachelor of Business. It further states that the Provider Registration and International Students Management System (PRISMS) records indicate the applicant's enrolment in the Bachelor of Business was cancelled on 16 May 2017 for the reason '*Student Notifies Cessation of Studies*' and he enrolled in a Vocational Education Sector course, namely a Certificate III in Commercial Cookery.
9. At the scheduled hearing, the applicant explained that he was initially enrolled at the University of Sunshine Coast's Melbourne campus; that he completed the English language coursework but did not complete a Bachelor's degree. The applicant claimed to have begun a Certificate III in Commercial Cookery right up to the date of the visa's cancellation.
10. The applicant was issued a Notice of Intention to Consider Cancellation (NOICC) under s.107 of the Act on 18 August 2017.
11. The applicant provided a written response to the Department on 28 August 2017.
12. A delegate on behalf of the Minister cancelled the applicant's Subclass 573 student visa on 13 October 2017.

<sup>1</sup>AAT 1725620 f.8

13. The applicant applied to have the delegate's cancellation decision reviewed by the Tribunal on 20 October 2017.

*Procedural Matters*

14. There are no non-disclosure notices issued by the Department to the Tribunal on the departmental file (BCC2016/323756).

**CONSIDERATION OF CLAIMS AND EVIDENCE**

15. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
16. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.
17. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s.107 and that the notice issued under s.107 complied with the statutory requirements.

**Was there non-compliance as described in the s.107 notice?**

18. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s.107 notice was non-compliance with sections 101(b) and 103 of Subdivision C in the following respects:
  19. Section 101 A non-citizen must fill in or complete his or her application form in such a way that:
    20. (b) no incorrect answers are given or provided
  - 21.
  22. Section 103: A non-citizen must not give, present or provide to an officer, an authorised system, the Minister, or a tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented or provided.
23. For the purpose of Subdivision C of the Act, 'bogus document' is defined at s.5 of the Act as follows:
  24. Bogus document
  25. In relation to a person means, a document that the Minister reasonably suspects is a document that:
    - a) purports to have been but was not, issued in respect of the person; or
    - b) is counterfeit or has been altered by a person who does not have authority to do so; or
    - c) was obtained because of a false or misleading statement, whether or not made knowingly.

26.

27. Clause 573.223 of Scheduled 2 requires the student to be a 'genuine applicant for entry and stay as a student'. For all student visa subclasses, all applicants (whether in or outside Australia) must satisfy the s.65 delegate that the applicant is a 'genuine temporary entrant' and 'genuine student'. On the basis of the information outlined above, plus the requirements of the genuine temporary entrant criterion and all other relevant criteria, the applicant had been granted the Subclass 573 visa on 1 April 2016.
28. On 22 March 2016, the applicant lodged a Class TU Subclass 573 student visa application. As part of this TU 573 application, the applicant completed a Form 157A. On the form's ninth page, under question 30 it asks, "*Provide details of your high-test qualification obtained outside of Australia, as well as other studies and training obtained outside Australia*".
29. The applicant declared at question 30 of the student visa application form that his highest qualification obtained outside Australia was an 'Intermediate Examination' through the education provider 'Board of School Education Uttarakhand' located at 'Inter College, Bazpur Udham Singh Nagar, Uttarakhand India'. It states that the applicant declared that he commenced the qualification on 1 April 2014 and finished on 31 March 2015 and that he had attached the document. It further states that as proof of his qualifications the applicant provided a Certificate-Cum-Marksheet (no. 13023482) from the Inter College Bazpur USN School dated 26 May 2015, certifying that the applicant passed Intermediate Examination held in March/April 2015 from School Inter College Bazpur USN and his marks obtained in the exam are enclosed. A copy of the document is contained the Departmental file.<sup>2</sup>
30. According to the delegate's decision on 11 May 2016 Inter College Bazpur USN confirmed to the Australian Consulate in New Delhi that they had no record of the applicant having taken exams through their institution and could not locate his details amongst their records of previous students.
31. The departmental file indicates that a departmental official issued a NOICC on 18 August 2017, inviting the applicant to provide reasons not to cancel the student visa within a fourteen-day timeframe.
32. According to the delegate's decision the applicant responded to the NOICC on 28 August 2017 and claimed:

33. *I am writing this reply with a very heavy heart and shaky fingers. Though I have not done anything wrong the fear of Immigration has shaken me fully and thinking even about submitting the bogus certificates has made me this, don't know what would have happened if that would have taken place.*

34. *I Kamaldeep Singh Bajwa, would like to write that it has taken my life's hardwork to clear out my intermediate studies and such irresponsibility from my school administration has given me a dark spot on me and my family who have lot of hopes on me. For now, in my response I need to get myself safe and on the later part will definitely visit my school and sort the things out with them too.*

35. *Kindly find attached the letter from my school with the principal's stamp and request you to please give a reconsideration to the decision of cancelling my student visa. It has taken hell of life for my parents to send me to Australia for my studies and such miscommunication can ruin my life and I will be left with no option other than taking the step I never want to.*

<sup>2</sup>BCC2016/3237564 f.50

36. *I hope you can understand my frustration and stress and will give a close consideration to not to cancel my student visa. I hope this sleepless nights passes soon and I can take a sigh of relief after your positive reconsideration.*<sup>3</sup>

37. The applicant submitted a letter signed by Rajesh Kumar, the Principal of Inter College Bazpur (Udham Singh Nagar) dated 21 August 2017.<sup>4</sup>
38. According to the delegate's decision, the applicant's response to the NOICC was considered by the delegate considered the argument but the investigation undertaken by the Australian Consulate on 11 May 2016 and 18 August 2017, it shows the applicant provided incorrect answers to the question in his student visa application as well as a counterfeit document to support this application.
39. As the delegate acting on the Minister's behalf was satisfied the applicant did not comply with sections 101(b) and 103 of the Act, he or she proceeded to cancel the student visa on 13 October 2017.
40. On the day before the Tribunal's scheduled hearing, the applicant provided a statutory declaration dated and signed by the applicant. It is dated 2 April 2019. By way of summary it states that:
- The applicant genuinely passed his year 12 with All India Senior School Certificate Examination conducted by the Central Board of Secondary Education (CBSE);
  - The applicant attended Sri Dasmesh School;
  - The father of the applicant has made a First Incident Report (FIR) against the company and director of the agency that provided a bogus document;
  - The agent who provided the bogus document responded to the NOICC on behalf of the applicant as it was a small error;
  - The applicant could not see the emailed NOICC response sent to the Department as it was deleted;
  - The applicant does not have any idea why the agency submitted a bogus or fake Year 12 certificate when he had a true one.
41. Also submitted on the same day as the statutory declaration as supportive evidence was:
- An untranslated First Incident Report (FIR) against the agent's business lodged by the applicant's father to the authorities in India. The date of the FIR is 2 April 2019 – more than a year after the alleged death of the agent back in India in December 2018;
  - An affidavit dated and signed by the applicant's father;
  - A signed affidavit from the applicant's father that the agent had died on 3 December 2018. It is dated 27 March 2019;
  - Another affidavit signed by Vivek Singh attests the applicant had genuinely completed the relevant studies;
  - A letter dated 18 March 2019 from the principal of the applicant's school, Sri Dasmesh School, that he was a *bonafide* student and graduate in 2015;
  - A copy of the applicant's marks statement from May 2015 indicating the applicant passed year 12 as pupil of Sri Dasmesh School; and

<sup>3</sup>BCC2016/3237564 f.112

<sup>4</sup> BCC2016/3237564 f.113

- A class photograph purporting to be of the applicant attending Sri Dasmesh School. It is dated 2013-2014.
42. At scheduled hearing, the applicant did not dispute that the bogus document in question was non-compliant.
  43. However he claimed that he was not responsible. He further claimed that the response provided to the NOICC request had not been undertaken by him. The applicant elaborated that around the time of the NOICC being issued, the applicant contacted the agent who advised and assisted him in his student visa application. The agent informed him it was a minor error. When the agent offered to address the matter by contacting the Department on his behalf, the agent requested the applicant to provide his email address and password. The applicant complied as he trusted him.
  44. The applicant insisted that he completed his 'Plus 2' at senior college and that he provided the genuine documents to the agent in 2016. When the Tribunal enquired into the reasons any agent would substitute bogus or counterfeit documents in favour of genuine ones, the applicant responded that he had no idea and that the agent insisted the bogus documents were minor error of administrative kind. The Tribunal further enquired into the reasons he provided an agent with his email address and password given he had provided bogus documents and the reasons he did not engage a new migration agent or lawyer. The applicant insisted he trusted the agent to fix the matter. He further stated that he consulted an agent in Australia who said the cancellation decision could be appealed. He further elaborated the unethical agent who submitted his visa application was killed in a car incident in December 2018 and was no longer available to vouch for his account about either the bogus document or the response to the NOICC.
  45. As outlined above, the applicant has submitted a range of documents to support his argument that he genuinely completed Year 12 and that there was no need for him to provide a bogus document. The Tribunal discussed with the applicant that the bogus document at the time of the visa application presented notably higher (first division) results than the CBSE document presented to the Tribunal. The Tribunal said this indicated that the reason for submitting a bogus document had been to exaggerate academic results so that the applicant would be granted a Subclass 573 visa for higher education. The applicant responded by stating that it could have been the reason the agent provided the fake document.
  46. The applicant moreover claimed that the onus of providing a bogus document should have been on the Australian official who granted the visa. The Tribunal enquired that given the applicant signed the visa application form and that the signatures on the Form 157A and the statutory declaration appear the same, the applicant had the opportunity to check the application with its attachments. The applicant claimed the agent did not provide him with anything to sign.
  47. The Tribunal has also considered the witness' testimony during the hearing. It is accepted the witness is the uncle. He assured the Tribunal that he was reliably informed by the applicant's parents and the applicant that genuine documents had been submitted to the agent. He added that there was much migration fraud emanating from India. Based on the witness' limited but otherwise credible testimony, the Tribunal finds the witness did not have any first hand evidence about whether non-compliance with sections 101(b) and 103.

### *Findings*

48. As discussed in the hearing, the applicant does not dispute that incorrect information or the bogus document had been provided at the time of the lodgement of this student visa

application, which led to the grounds for the cancellation. Based on this admission, the Tribunal is able to proceed with a finding that the grounds cancellation exists. In this matter for review, the applicant has disputed that he had knowingly given or provided that he knowingly caused to be given or provided incorrect information which was non-compliant with s.101(b) or a bogus document which was non-compliant with s.103 or that they were provided on his behalf.

49. When considered cumulatively, the applicant's far-fetched and implausible explanations about a lack of knowledge of any non-compliance leading to the cancellation have invited serious adverse credibility concerns about the applicant as a credible and reliable witness of truth. The Tribunal accepts the applicant attended and graduated at a different school from the one claimed at the time of this student visa application and that he provided genuine documents to support this. However the difference in academic results has invited the Tribunal to consider that applicant had been motivated to exaggerate his average or mediocre school results by claiming to attend a school he did not attend with better results. The Tribunal makes the following adverse credibility findings relevant to the grounds for cancellation being made out:
50. The Tribunal accepts the applicant attended and graduated at a different school from the one claimed at the time of this student visa's application, however it does not accept the applicant's weak explanation that his agent based in India at the time of application submitted the document and incorrect information without his knowledge or without having knowingly caused it to have occurred. It does not accept the applicant was not motivated to do so because of his original underwhelming Year 12 academic results. It does not accept that he provided his own signatures at the time of application. The Tribunal finds the incorrect information and bogus document had been fabricated in order to have a Subclass 573 student visa granted and it became, at least partially, the reason for the visa being granted.
51. The Tribunal does not accept the applicant's far-fetched claim to have ever contacted his agent whom he claimed to continue to trust agent when the NOICC was issued. It finds that the applicant fabricated the explanation that the agent informed him it was a minor error which he could address. The Tribunal further finds the applicant fabricated the related far-fetched claim that he provided his email password so the agent could email the Department a response on his behalf and that the agent later deleted the sent email. Instead it finds the applicant himself had been responsible for providing a fabricated explanation to the Department as part of his NOICC response.
52. With regard to the applicant's oral testimony at the hearing and written statements from himself and his father, it does not accept the agent in question or his agency refused to co-operate with the applicant and his family in admitting to the fraudulent behaviour. Neither does it accept the agent in question was in a fatal car accident in December 2018; nor does it accept the applicant's father made a genuine complaint or First Incident Report to the authorities in India against the agency or its directors that he claimed participated in submitting incorrect information and a bogus document.
53. Overall, the applicant has not demonstrated to the Tribunal that he is a credible or reliable witness. He and his father have fabricated explanations for the non-compliance in both written and oral evidence to the Tribunal. The applicant is accordingly found to have knowingly given incorrect information which was non-compliant with s.101(b) and a bogus document which was non-compliant with s.103.
54. By way of parenthesis, based on these findings, the applicant has further invited the Tribunal to make further adverse findings with regards to the reasons this visa should not be cancelled.

55. For these reasons, the Tribunal finds that there was non-compliance with sections 101(b) and 103 in the way described in the s.107 notice.

## **DECISION WHETHER TO CANCEL**

### **Section 109(2) of the Act - Should the visa be cancelled?**

56. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s.107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s.109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s.109(2).

#### **Should the visa be cancelled?**

##### *Mandatory considerations*

57. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s.107 notice about the non-compliance, and have regard to any prescribed circumstances: s.109(1)(b) and (c). The prescribed circumstances are set out in r.2.41 of the Regulations. Each of the prescribed circumstances is considered below:
58. While these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedural Advice Manual (PAM3) 'General visa cancellation powers', which refers to matters such as the consequences of cancelling the visa, international obligations and any other relevant matters.

##### *The correct information*

59. The Tribunal is satisfied that the applicant did not provide correct information in his submitted Form 157A at question 30. While there is no further information available to the Tribunal that he has submitted any further incorrect information at the time of application, the identified incorrect information is a very serious matter.

##### *The content of the genuine document (if any)*

60. The content of the document that led to the cancellation of this visa is found to be bogus and non-compliant with s.103. While there is no further information available to the Tribunal that he has submitted any further bogus documents at the time of application, the acknowledged bogus document is a very serious matter.

##### *Whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document*

61. The decision to grant the applicant the cancelled student visa under review was based, at least partially, on the incorrect information and a bogus document as outlined above. These provided the grounds for cancellation which are outlined above. The Tribunal places considerable weight on this factor in favour of the visa remaining cancelled.

##### *The circumstances in which the non-compliance occurred*

62. The applicant has claimed that he was not knowingly involved in the non-compliance and that he was shaken when the Department notified him about the bogus document. The applicant claimed it was his agent's unethical behavior which led to the non-compliance and



he has no responsibility whatsoever for it occurring. As mentioned above, the Tribunal does not accept the applicant did not knowingly or knowingly cause to be given a bogus document. The Tribunal has made findings that he has knowingly been non-compliant with sections 101(b) and 103. These are very serious matters. Furthermore the Tribunal finds the applicant has fabricated the circumstances to the Tribunal with far-fetched claims in a deceitful manner and he lacks overall credibility. There is no indication that the applicant had any credible extenuating circumstances beyond his control that led to this non-compliance being undertaken. The Tribunal accordingly places considerable weight on this factor in favour of the visa remaining cancelled.

*The present circumstances of the visa holder*

63. The applicant, aged 22, claimed that Australia is a better place than his home country of India and that he was continually studying in a Certificate III until his visa was cancelled. The applicant is not married, engaged, or living in a *de facto* spousal relationship. Neither does he have any dependants. Nor does he claim to have any physical or psychological health problems. The applicant also made a claim during the scheduled hearing that no one back in India will assist him if his visa is cancelled. However, he also stated in the hearing that his parents have 'sacrificed so much' for him to migrate to Australia. Furthermore a witness who is the applicant's uncle attested to the applicant's desire to return to his studies and that his family remains supportive. He also presented evidence in his father's affidavit which is also supportive of the applicant. The Tribunal does not accept the applicant will return to India without any familial support, although it accepted he will face some challenges. There is little arising from the present circumstances of the former visa holder of this cancelled student visa to indicate the applicant has any compassionate, compelling and exceptional circumstances. The Tribunal places on a negligible amount of weight on this consideration in favour of the applicant's visa being reinstated.

*The subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act*

64. Subdivision C of Division 3 of Part 2 of the Act (ss.97 - 115) contains provisions regarding visas based on incorrect information may be cancelled. As presently drafted, jurisdictional error arises for asking the wrong question. Subsequent behaviour' in this context means behaviour which took place after the non-compliance. The Court in *MIAC v Khadgi* (2010) 190 FCR 248 made it clear that subsequent behaviour that is not linked to the visa holder's obligations under Subdivision C is irrelevant to the proper consideration of r.2.41(f). The applicant's persistent denial that there was incorrect information involves a failure to comply with s.105. The Tribunal finds this to be a serious matter.

*Any other instances of non-compliance by the visa holder known to the Minister*

65. As discussed in the hearing, the applicant was not enrolled in a Bachelor's degree at the time of his visa being cancelled and this suggested to the Tribunal that he was not compliant with condition 8202 which requires student visa holders to remain continuously enrolled in a registered coursework commensurate with their Subclass of student visa. In the applicant's case, he was holding a Subclass 573 visa for higher education purposes, not vocational education purposes. The Tribunal considers this breach of condition imposed on him as a student visa holder to be a serious matter. There is no other information before the Tribunal to indicate that the applicant has not complied with any other conditions of his visa.

*The time that has elapsed since the non-compliance*

66. Over three years have elapsed since the applicant provided the incorrect information in his Student (Subclass 573) visa application. As discussed in the hearing, the Tribunal did not

find the three years that the applicant had spent in Australia since he applied for a student visa with incorrect information and a bogus document to be very relevant. As it does not consider this an extensive amount of time and that he may have other migration options, open to him to remain in Australia, albeit considerably narrowed if this visa remains cancelled, the Tribunal places little weight on this factor in favour of the visa not being cancelled.

*Any breaches of the law since the non-compliance and the seriousness of those breaches*

67. The applicant admitted he has received a traffic fine leading to a 300 Australian dollar fine and a one-month suspension. As discussed in the hearing, as no State or Territory government has attempted to cancel or to substantially suspend his driving licence, the offense appears to be minor. There is no information before the Tribunal regarding non-compliance by the applicant with other visa conditions, and there is no information before the Tribunal to indicate that the applicant has otherwise breached Australian law including its migration and criminal laws.

*Any contribution made by the holder to the community*

68. The applicant claimed that he donates on a regular basis to a heart patient charity and he has donated to a Sikh temple being built. He also mentioned attending a Sikh temple. Taken as a whole, the Tribunal places a minute amount of weight on this in favour of the visa not being cancelled.

*Non-mandatory considerations*

69. During the hearing, the applicant insisted that he just wanted to remain in Australia to complete his studies and that he had not done anything wrong. He elaborated that his future will be spoilt and that he will not be able to undertake a Bachelor's degree in India without completing a vocational certificate. There would be a three year gap between himself and his peers who are now completing degrees or graduating from higher education. The applicant said that he wanted to return to India with a qualification so as to open a café but opening such a business is difficult in India due to the widespread corruption in his country. (The Tribunal does not accept this specific argument. While red tape and corruption may be excessive in India, no qualification in a Bachelor's degree is required to open and operate a café in India.). The Tribunal enquired whether he wanted to remain in Australia, to which he responded that it was his dream to both finish studies and open a café in Australia. The Tribunal asked if the applicant was aware that there is a general temporary entrant test attached to student visas. The applicant said he did not know about that but he would like to apply for permanent residency. The applicant's inconsistent testimony about the reasons for travelling to Australia has invited serious doubts about whether the applicant genuinely intended to travel to Australia to complete a Bachelor's degree.
70. Having considered this testimony and in the context of the Tribunal's earlier findings regarding sections 101(b) and 103 of the Act, the Tribunal finds that the applicant deceitfully applied for a temporary student visa solely to gain access to permanent residency and not for the purposes for which this visa under review was granted.
71. During the hearing, the mandatory legal consequences of the cancellation of this visa were discussed. The applicant dramatically claimed he could not wait three years to return to Australia and his life was over at the age of 22. In this context, it is noted the applicant has limited or narrowed migration options. He could be asked to leave Australia while holding a bridging visa. He may also be detained or forcibly removed if the applicant were to become an unlawful non-citizen in Australia. However the applicant has neither applied for a

protection or a partner visa since arriving in Australia and is unlikely to be indefinitely detained if he becomes unlawful.

72. It is accepted the applicant has a degree of hardship, both emotionally and financially, in having his visa remained cancelled. This will arise from a financial loss (as his father sold land to afford his migration and tuition costs), a lack of academic attainment or progress and some familial disappointment. It is also accepted that the applicant's admitted plans to permanently migrate to Australia to set up a café were in jeopardy. However it does not accept the applicant was prevented from either continuing his studies or opening cafés or catering businesses in India will be significantly curtailed by red tape or corruption. At the age of 22, the applicant's adult life is not over, as he overly pessimistically predicted. Indeed it has hardly begun. For these reasons, the Tribunal does not accept the applicant will face a degree of psychological, emotional and financial hardship that can be described as severe, significant or even notable if this visa remains cancelled.
73. With regard to consequential cancellations under s.140 of the Act, as noted above the applicant does not have any dependants attached to his cancelled student visa.
74. With regard to whether any international obligations would be breached from this cancellation remaining in place, the applicant did not advance any specific '*non-refoulement*' matters and does not claim to have any physical or psychological illnesses or injuries. The applicant claimed that no one will help him in returning to India although he accepted his family continue to love him and will welcome him back. For these reasons, the Tribunal places negligible weight on these factors about the mandatory legal consequences arising from Australia's international obligations in favour of the visa not remaining cancelled.
75. Neither the applicant nor the witness advanced any further relevant reasons, other than the witness stating that there is a lot of migration fraud in India which is motivated by greed.
76. However, the applicant is found by the Tribunal not to be a credible or reliable witness of truth to have wilfully and knowingly provided or caused to be provided incorrect information and a bogus document in non-compliance with sections 101(b) and 103. The applicant deliberately set out to deceive the Department and the Tribunal for migration purposes. The Tribunal places considerable weight on these factors in favour of having his visa not being reinstated.
77. Overall, the applicant has not demonstrated that he is a genuine full time student who wants to complete a Bachelor's degree. Neither has he demonstrated that he has even a notable degree of hardship from the mandatory legal consequences or any other matter arising from this visa remaining cancelled. Based on the adverse findings about the applicant's overall credibility, the applicant has demonstrated determination to remain in Australia on a permanent basis as well as a high degree of contempt towards its migration laws and a willingness to fabricate evidence and to exaggerate his personal circumstances.

## Conclusion

78. When all considerations have been taken into account, both individually and cumulatively, and with particular emphasis on the seriousness of the non-compliance, the Tribunal considers the above factors when considered overall weigh significantly in favour of this student visa's cancellation.
79. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Further, having regard to all the relevant circumstances, as discussed above, the Tribunal concludes that the visa **should** be cancelled.

## **DECISION**

80. The Tribunal affirms the decision to cancel the applicant's Subclass 573 Higher Education Sector visa.

Brendan Darcy  
Member

## ATTACHMENT – *Migration Act 1958* (extracts)

### 5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
  - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
  - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

### 97 Interpretation

In this Subdivision:

**application form**, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

**passenger card** has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: **Bogus document** is defined in subsection 5(1).

### 98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

### 99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

### 100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

### 101 Visa applications to be correct

A non-citizen must fill in or complete his or her application form in such a way that:

- (a) all questions on it are answered; and
- (b) no incorrect answers are given or provided.

### 103 Bogus documents not to be given etc.

A non-citizen must not give, present, [produce]\* or provide to an officer, an authorised system, the Minister, the Immigration Assessment Authority, or the Tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented, [produced]<sup>5</sup> or provided.

### 107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
- (a) giving particulars of the possible non-compliance; and
  - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
    - (i) if the holder disputes that there was non-compliance:
      - (A) shows that there was compliance; and

\*This wording applies to documents given, presented, produced or provided on or after 4 November 2014: Schedule 7 to *Counter Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (No.116, 2014).

- (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or
  - (ii) if the holder accepts that there was non-compliance:
    - (A) give reasons for the non-compliance; and
    - (B) shows cause why the visa should not be cancelled; and
- (c) stating that the Minister will consider cancelling the visa:
  - (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
  - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
  - (iii) otherwise—at the end of that period; and
- (d) setting out the effect of sections 108, 109, 111 and 112; and
- (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
- (f) requiring the holder:
  - (i) to tell the Minister the address at which the holder is living; and
  - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
  - (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
  - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
  - (a) visas of a stated class; or
  - (b) visa holders in stated circumstances; or
  - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
  - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

## **108 Decision about non-compliance**

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

## **109 Cancellation of visa if information incorrect**

- (1) The Minister, after:
  - (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
  - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
  - (c) having regard to any prescribed circumstances;
 may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.